International Union of Elevator Constructors, Local 91 *and* Otis Elevator Company and Perini Building Company and International Union of Operating Engineers, Local 478. Case 34–CD–64

September 9, 2003

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. The charge was filed March 6, 2002, by the International Union of Operating Engineers, Local 478 (Operating Engineers), alleging that the Respondent, International Union of Elevator Constructors, Local 91 (Elevator Constructors), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Perini Building Company, Inc. (Employer Perini), to assign certain work to employees represented by Elevator Constructors rather than to employees represented by Operating Engineers. The hearing was held on March 19 and April 1, 2002, before Hearing Officer Margaret A. Lareau.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free of prejudicial error. On the entire record the Board makes the following findings

I. JURISDICTION

The parties stipulated that Otis Elevator Company (Employer Otis), is a New Jersey corporation engaged in the business of manufacture, research and development, retail and nonretail sale, and distribution of elevators and related products at its East Hartford, Connecticut facility. During the 12 months preceding the hearing, Employer Otis purchased and received goods in excess of $50,000 at its East Hartford, Connecticut facility, directly from points located outside the State of Connecticut.

The parties stipulated that Employer Perini is a Massachusetts corporation engaged in the operation of a general contracting business. During the 12 months preceding the hearing, Employer Perini provided services valued in excess of $50,000 in states other than the Commonwealth of Massachusetts.

The parties stipulate, and we find, that the Employers are engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Elevator Constructors and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. DISPUTE

A. Background and Facts of Dispute

The Mohegan Tribal Gaming Authority (MTGA) hired Employer Perini to manage the construction of phase II of the Mohegan Sun Casino Resort project, consisting of the expansion of an existing casino and the construction of a major sports arena, several surrounding projects, and a hotel tower. Employer Perini procured subcontractors for the construction of the tower, but elected to perform itself all hoisting on the project, including the tower cranes, outside hoists, and interior elevators also known as cars.[1]

Employer Perini has a collective-bargaining agreement with Operating Engineers, but not with Elevator Constructors. Employer Perini initially assigned in writing the outside hoisting work to employees represented by Operating Engineers and, as discussed below, later made a written assignment to them of the operation of the interior cars.

Employer Otis, a subcontractor,[2] was hired to install, test, and repair the elevators at the Mohegan Sun Resort. Employer Otis was to turn the tower elevators over to Perini for use in moving a combination of people and materials for construction purposes after the elevators were installed and tested. Employer Otis has a collective-bargaining agreement with Elevator Constructors.

On June 1, 2001, Perini Senior Project Manager Travis Burton assigned, in writing, the operation of the inside elevators to employees represented by the Operating Engineers. Elevator Constructors Business Manager Dominic Accarpio learned of the assignment and met with Burton. Burton indicated he would be amenable to a splitting of the work, provided that Elevator Constructors adjusted their wages to those paid under Operating Engineers' collective-bargaining agreement and that the two Unions entered into a side agreement concerning the disputed work. Otherwise, according to Burton, Perini was obligated to assign the work to Operating Engineers-represented employees as provided in the collective-bargaining agreement. Accarpio refused.

Accarpio then spoke with Senior Project Manager Emil Newman of the Mohegan Sun Gaming Authority.

[1] Employer Perini's senior project manager, Travis Burton, testified that the reason Perini chose to perform the hoisting itself was so that Perini could coordinate the flow of personnel and building materials throughout the 36 stories of the hotel tower in order to effectively manage the construction process.

[2] Employer Perini hired Employer Otis to install, test, and repair the elevators, but Otis's contract is with Mohegan Sun and not Employer Perini.

Newman approved of the splitting of the work, since in his experience in New York and New Jersey the two unions split the operation of the elevator cars, provided there was wage parity. Newman also informed Accarpio that Perini had ultimate authority to assign the work.

B. Work in Dispute

The disputed work consists of the operation of inside elevators to move a combination of workmen and materials during the construction of the hotel tower after the elevators' installation, but before final inspection and certification of the elevators for public use[3] in the hotel tower at the Mohegan Sun Resort.

C. Contentions of the Parties

Employer Perini argues that employees represented by Elevator Constructors walked off the job in order to force Perini to reassign half the disputed work to employees represented by Elevator Constructors and that the parties have not agreed on a voluntary settlement method.[4] It therefore argues reasonable cause exists to believe that Section 8(b)(4)(D) of the Act has been violated. Employer Perini contends that the employees represented by Operating Engineers should be awarded the operation of the interior cars for hoisting personnel and materials in the State of Connecticut. Perini contends that the following factors support this award: (1) collective-bargaining agreements; (2) employer preference and assignment; (3) area and industry practice; and (4) economy and efficiency of operations.

Employer Otis argues that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated and that the Board should award the disputed work to the employees represented by Elevator Constructors. Otis contends that the following factors favor assigning the work to employees represented by Elevator Constructors: (1) collective-bargaining agreements; (2) industry and area practice; (3) skills; and (4) economy and efficiency of operations.

Operating Engineers contends that the factors of collective-bargaining agreements, Employer Perini's preference, area and industry practice, and economy and efficiency of operations favor employees represented by the Operating Engineers, and that skills and training favor neither employee group.

Elevator Constructors argue that no jurisdictional dispute exists because the dispute was over the wage rate to be paid employees represented by Elevator Constructors, rather than which group of employees should perform the work. Thus, it argues that the Board should quash the notice of hearing. It further argues that, if the Board finds that a jurisdictional dispute exists, then the Board should award the work to employees represented by Elevator Constructors on the basis of employer preference and past practice, industry and area practice, skills, and economy and efficiency of operations.

D. Applicability of the Statute

Before the National Labor Relations Board may proceed with a determination of the dispute pursuant to Section 10(k), it must be satisfied that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of their dispute.

On the morning of September 11, 2001, Elevator Constructors Local 91 Business Manager Dominic Accarpio met with Perini Project Manager Travis Burton for a second time, demanding that Perini reassign operation of half of the elevator cars used for moving a combination of workmen and materials in the tower to employees represented by Elevator Constructors. Burton informed Accarpio that he would not consider reassigning half the work unless Elevator Constructors agreed to work at Operating Engineers' contractual wage rate. He also insisted that Operating Engineers agree in writing to Elevator Constructors-represented employees sharing the work. Accarpio rejected the lower wage rate on behalf of Elevator Constructors. Elevator Constructors and Operating Engineers did not enter into a side agreement. Immediately following the unsuccessful meeting, Elevator Constructors-represented employees walked off the job.

Perini President Craig Shaw was on the site and called a meeting to deal with the walkout.[5] As a result, Employer Perini reassigned half of the work to employees represented by Elevator Constructors.[6] Following the reassignment, Elevator Constructors-represented employees returned to work.

[3] Once the elevators were installed and tested, but before final inspection, Employer Otis was to turn control of the cars over to Perini so that Perini could control the flow of workmen and materials throughout the tower.

[4] In support of its position, Perini notes that Employer Otis originally filed charges with the Board alleging that Elevator Constructors walked off the job to force the reassignment of work, but that Otis later settled the matter with Elevator Constructors.

[5] At the time of the walkout Employer Otis was still installing elevators and performing other related work. Employees represented by Operating Engineers had not yet assumed operation of the elevators.

[6] Under the agreement reached, the first car would be assigned to an employee represented by Operating Engineers and the second car would be assigned to an employee represented by Elevator Constructors. If there were an even number of cars, then each Union would have an equal number of employees it represented performing the work. If there were an odd number of cars, then Operating Engineers-represented employees would operate one more car. The wage rates paid are specified in the two Unions' collective-bargaining agreements.

Although Elevator Constructors describe this dispute as exclusively over wage rates, it is not. Employer Perini had not assigned half the work to Elevator Constructors-represented employees before the walkout, and Elevator Constructors had not agreed to the terms required by Employer Perini. Even assuming that one object of the walkout was economic, there is reasonable cause to believe that an object of the walkout was to force Perini to reassign half the work to employees represented by Elevator Constructors.[7] The parties stipulated that there is no method of resolving the dispute that would be binding on all the parties.

We find that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there is no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones construction)*, 155 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications & collective-bargaining agreements

There is no evidence of any Board certifications concerning the employees involved in this dispute.

Both Operating Engineers and Elevator Constructors have collective-bargaining agreements with an employer on the project that arguably covers the disputed work.

Article III, trade jurisdiction, section 1, of Operating Engineers' collective-bargaining agreement with Employer Perini states in pertinent part that Operating Engineers have "exclusive jurisdiction for hoisting materials and/or workman, whether inside or outside the building," and that "[t]he Employer agrees that the Union shall be the exclusive representative of all employees performing . . . [t]he maintenance and or operation of . . . elevators used for hoisting materials and/or workmen, whether inside or outside the building."

Article IV, paragraph 2, of Elevator Constructors' contract with Employer Otis contains a list of job functions that employees represented by Elevator Constructors exclusively are to perform where Otis is the Employer. Those functions include the "operation of temporary elevator cars."

Although both Unions' collective-bargaining agreements arguably cover the work in dispute, the collective-bargaining agreement that is relevant is the one that has been negotiated with the employer who has the ultimate control over the assignment of the work. *See Moving Picture Machine Operators Locals 27 & 48*, 227 NLRB 142, 144 (1976). In this instance, it is the collective-bargaining agreement with Employer Perini, as Perini elected to perform all hoisting work itself, including the disputed work, and has ultimate authority over whoever does the work. Only Operating Engineers have a collective-bargaining agreement with Perini.

In these circumstances, we find that the factor of collective-bargaining agreements favors awarding the disputed work to employees represented by Operating Engineers.

2. Employer preference

At the hearing and in its brief, Employer Perini states that its preference is to have the disputed work performed by employees represented by Operating Engineers. Therefore, we find that this factor favors awarding the disputed work to the employees represented by Operating Engineers.

3. Area and industry practice

Both unions listed a number of sites within Connecticut where represented employees performed the disputed work. In many instances, it was unclear whether both Unions were on the same construction site, who the general contractor was, or what the elevators were carrying. Both sides did show that employees they represent performed the disputed work in Connecticut.

The evidence is not clear as to whether employees represented by one Union or the other more typically performed the disputed work in similar circumstances. Thus, we find that this factor does not favor awarding the disputed work to employees represented by either Union.

4. Joint Board decisions

Operating Engineers presented Joint Board decisions in which employees represented by Elevator Constuctors were awarded the assignment of cars used only for the movement of personnel, while employees represented by Operating Engineers were awarded in different instances cars used for the movement of material or a combination of personnel and material. The Joint Board decisions were not recent. None involved the same employers, and the awards did not set forth the circumstances behind the

[7] "One proscribed objective suffices." Teamsters Local 50 (Schnabel Foundation), 295 NLRB 68, 70 (1989).

award and specified that each award was specific to that particular case.

Based on these facts, we find that the Joint Board awards do not favor employees represented by either Union.

5. Relative skills

The record shows that employees represented by both Unions possess the skills necessary to perform the work and that neither is better able to perform the work.

The disputed work consists of pushing buttons, a skill that employees represented by both Unions possess. We find that this factor does not favor employees represented by either Union.

6. Economy and efficiency of operation

Employer Perini argues that it is more efficient and economical to use employees represented by Operating Engineers. Perini notes that by using Operating Engineers-represented employees, Perini can directly control the progress of the project by controlling which floors receive personnel and materials, whereas by using Elevator Constructors-represented employees, Perini must delegate to Employer Otis the responsibility of controlling the flow of personnel and materials throughout the tower. This reduces Perini's control of the project and provides a disincentive to performing the work itself.

Employer Otis and Elevator Constructors argue that it is more efficient to use Elevator Constructors-represented employees because only these employees have the skills to repair the elevators. If an elevator breaks down, an elevator constructor operating the car can immediately make repairs instead of having to wait for an elevator constructor to be called to the site. There is no evidence that elevators break down frequently. Moreover, employees represented by Elevator Constructors are under contract to perform the repairs and are on site. There would be little delay in waiting for an elevator constructor to make the repairs.

Employer Perini and Operating Engineers argue that it is more economical to use employees represented by Operating Engineers. Perini and Operating Engineers point to Elevator Constructors' wage rate being $18/hr greater than Operating Engineers'. However, the Board does not consider wage rates as a basis for determining whether one group of employees is more economical than another group of employees.[8]

We find the factor of efficiency and economy does not favor employees represented by either Union.

[8] See Laborers, 318 NLRB 917, 918 (1995).

CONCLUSIONS

After considering all the relevant factors, we conclude that employees represented by Operating Engineers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference and collective-bargaining agreements. *See Local 81, Plumbers & Pipefitters*, 327 NLRB 9 (1998) (awarded work on basis of employer preference and collective-bargaining agreement). There are no countervailing factors supporting an award to employees represented by Elevator Constructors.

In making this determination, we award the work to employees represented by the International Union of Operating Engineers, Local 478, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

Scope of Award

The work award is limited to the hotel tower at the Mohegan Sun Resort in Uncasville, Connecticut. We reject the arguments of Employers Perini and Otis favoring a broader award encompassing wherever the work is performed throughout the State of Connecticut. Only where the evidence indicates that the disputed work will be a continuing source of controversy in the relevant geographic area, and that similar disputes are likely to recur, and the charged party has a proclivity to engage in unlawful conduct to obtain work similar to the disputed work, will we make an award of work broader than one covering the jobsite. See *Standard Sign & Signal Co.*, 248 NLRB 1144, 1148 (1980).

Employer Perini intends to continue employing employees represented by Operating Engineers and to continue to subcontract with elevator companies employing employees represented by Elevator Constructors. Otis intends to continue employing employees represented by Elevator Constructors, and both Unions desire to perform the same work. However, there is no evidence that Elevator Constructors has a demonstrated proclivity to engage in unlawful conduct to obtain the disputed work.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Perini Building Company, Inc., represented by the International Union of Operating Engineers, Local 478, are entitled to operate the interior cars used for transporting a combination of workmen and materials (after the cars are turned over but before final inspection and certification for public use) at the hotel tower at the Mohegan Sun Resort in Uncasville, Connecticut.

2. International Union of Elevator Constructors, Local 91, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Perini Building Company, Inc., to assign the disputed work to employees represented by it.

3. Within 14 days from this date, International Union of Elevator Constructors, Local 91, shall notify the Regional Director for Region 34 in writing whether it will refrain from forcing Employer Perini, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

Dated, Washington, D.C. September 9, 2003

_____

Robert J. Battista, Chairman

_____

Wilma B. Liebman, Member

_____

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD